

Commentary

Rent-A-Center West, Inc. v. Jackson — Who Is The Proper ‘Gatekeeper’ Of Arbitrability?

Looking Into The Crystal Ball: Preview Of The April 26th Arguments

By

Raquel A. Rodriguez

and

B. Ted Howes

[Editor’s Note: Raquel Rodriguez is a partner in the Miami office of McDermott Will & Emery LLP and is a member of the firm’s Trial Department. She focuses her practice on commercial and international dispute resolution and strategy, government strategies and crisis management. B. Ted Howes, a member of the firm’s Trial Department, is a partner in the New York office of McDermott Will & Emery LLP. Mr. Howes has extensive experience in all aspects of international dispute resolution; he has successfully defended both U.S. and foreign companies in a wide variety of commercial arbitrations. Part 1 of a two-part series. Copyright 2010 by Raquel Rodriguez and B. Ted Howes. Replies to this commentary are welcome.]

The April 26th, oral argument before the United States Supreme Court is the next installment of the never-ending debate over the permissible scope of arbitration clauses under the Federal Arbitration Act (FAA)¹ and the proper allocation of power between judges and arbitrators. In *Rent-A-Center West, Inc. v. Jackson*,² the Justices will decide whether or not parties can contractually agree to have an arbitrator, and not a court, decide whether or not a valid agreement to arbitrate exists in the face of a claim by one party that the arbitration agreement itself is unconscionable. The case has generated significant interest in the business community, the labor movement and in the arbitration community, with numerous amicus briefs having been filed, including by such groups as the U.S. Chamber of Commerce,

on the “pro-arbitration” side, and the AFL-CIO, on the “pro-court” side.

This article will preview the arguments of the parties, as well as questions the Justices may pose. Recent decisions by the Court regarding arbitration under the FAA provide insight into how the Justices may line up. The case has the potential to upend arbitration agreements that expressly provide that arbitrators have the jurisdiction to determine their own jurisdiction, or that incorporate institutional arbitration rules (such as the AAA, UNCITRAL or ICC rules) that similarly provide that arbitrators can rule on their own jurisdiction, as well as on the scope and validity of arbitration agreements.³

Background

The Respondent, Jackson, was an employee of the Petitioner, Rent-A-Center, and sued the company in the United States District Court for the District of Nevada after he was terminated, alleging race discrimination and retaliation under 42 U.S.C. § 1981. Rent-A-Center moved to dismiss the complaint and compel arbitration pursuant to an Agreement to Arbitrate Claims (“Arbitration Agreement”) that Jackson signed as a condition to being hired. The Arbitration Agreement provided specifically:

The Arbitrator and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute

relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

The Arbitration Agreement also provided that each party had the right to obtain certain discovery, to have written notice of all witnesses and exhibits to be offered by the opponent at least 30 days in advance of the hearing, to have impartial arbitrators and to have the arbitrators apply the substantive law and award all legal remedies available as if their claim were being pursued in court.⁴

Jackson alleged that the Arbitration Agreement was substantively and procedurally unconscionable under Nevada law and should not be enforced by the courts. Specifically, Jackson argued that the Arbitration Agreement was substantively unconscionable because it limited discovery and required each party to pay an equal share of the arbitration costs, and that it was procedurally unconscionable because the parties had unequal bargaining power and it was presented to him as a non-negotiable condition of employment. The District Court disagreed, granted Rent-A-Center's motion to compel arbitration and dismissed the complaint. In so doing, the District Court ruled that the Arbitration Agreement expressly delegated to the arbitrator the decision whether or not the Arbitration Agreement was enforceable.⁵

The Ninth Circuit Decision

On appeal, the Court of Appeals for the Ninth Circuit reversed, holding, “[w]here, as here, an arbitration agreement delegates the question of the arbitration agreement’s validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter.”⁶ In so doing, the Ninth Circuit cited to *Buckeye Check Cashing, Inc. v. Cardegna*, a case which held, that when a party challenges the validity of a contract — but “not specifically its arbitration provisions” — the challenge to the contract’s provisions should be determined by the arbitrator and not by the court.⁷ This is known as the “doctrine of separability,” a doctrine that was established initially by the U.S. Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*⁸ According to the majority

opinion in *Jackson*, the “flip side” of the *Buckeye* holding is that challenges to the validity of an arbitration agreement, such as Jackson’s, was a threshold matter for the courts to decide.⁹

The majority also relied on its own precedent that decisions as to the invalidity and enforceability of an arbitration provision are for the courts under 9 U.S.C. § 2, since arbitration agreements are subject to all contractual defenses.¹⁰ Because the obligation to arbitrate is itself a matter of contract, a party cannot “meaningfully assent” to a contract in the absence of any “meaningful opportunity to modify the terms of the Agreement.”¹¹ In particular, the majority cited a 2007 decision which held that the courts should decide whether an agreement to arbitrate claims for violation of overtime laws was unconscionable.¹² It also relied on a recent decision of the Court of Appeals for the First Circuit, which held that courts may refuse to compel arbitration agreements that delegate the question of the existence of an agreement to arbitrators where the arbitration remedy is itself “illusory” because of “impossible burdens.”¹³

Citing to the Supreme Court’s decision in *First Options of Chicago, Inc. v. Kaplan*, Rent-A-Center argued that the courts should presume that the parties agreed to arbitrate arbitrability where, as in the contract at issue, there was “clear and unmistakable evidence” that they did so.¹⁴ The majority disagreed, holding that unlike the case in *First Options*, the issue before it was not whether there was silence or ambiguity in the contract about who should decide, but rather whether the parties entered into a valid agreement to arbitrate at all.¹⁵ The majority ruled that “as a matter of federal arbitration law, a court may not compel arbitration until it is ‘satisfied that the making of an agreement for arbitration or failure to comply therewith is not in issue.’ 9 U.S.C. § 4.”¹⁶ It called this threshold decision, “cooperative federalism.”¹⁷

Accordingly, the Ninth Circuit reversed the decision below and remanded it with instructions that the District Court determine whether or not the Arbitration Agreement was unconscionable. The Ninth Circuit (or at least the majority) determined that the District Court must, in particular, address Jackson’s unconscionability arguments regarding coverage and discovery provisions.¹⁸

The dissenting opinion stated that the majority had misread Sections 2 and 4 of the FAA, stressing that these provisions do not provide *who* is to decide whether an agreement to arbitrate is unconscionable.¹⁹ Warning that the majority's opinion "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just a bare allegation of unconscionability," the dissent observed that the majority's opinion also made it "difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so 'clearly and unmistakably.'"²⁰ The dissent, however, left open the possibility that a court *could* determine "'well-supported' claims" of unconscionability or illusory remedy, while still resolving "any doubts" as to what the parties agreed in favor of arbitration.²¹

Petition For Certiorari

Rent-A-Center petitioned for certiorari review, arguing that the Ninth Circuit's decision was in conflict with the opinions of the First, Eighth and Eleventh Circuits, as well as the Supreme Court's decisions in *AT&T* and *First Options*.²² The specific question presented to the Supreme Court is:

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act ("FAA") is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?²³

As set forth in the brief that it submitted in support of its certiorari petition, Rent-A-Center's central argument on appeal is that the Supreme Court repeatedly has held that the purpose of the FAA is to resolve any doubts concerning the scope of arbitration in favor of arbitration and reverse the courts' longstanding "hostility" to arbitration.²⁴ Rent-A-Center argues that this policy should extend to decisions by the parties as to which issues are arbitrable, what procedure will be followed, and so on.²⁵ Rent-A-Center further argues that the question of unconscionability is a "classic gateway" issue, no different from the question of whether the parties "clearly and unmistakably agreed"

to submit the question of arbitrability to the arbitrator instead of the court.²⁶ Rent-A-Center also argues that the Ninth Circuit's subjective "meaningful assent" test as to unconscionability is contrary to Nevada contract law, which follows an objective approach to contract formation.²⁷ Thus, once the parties state in writing that the arbitrators have authority to determine the validity of arbitration agreements, there is nothing for the courts to do other than compel arbitration.

Jackson's Response Brief

In urging the Court to reject the "per se" rule proposed by Rent-A-Center, Jackson's principal argument is that Section 2 of the FAA requires that a court, and not an arbitrator, determine whether an arbitration agreement is valid and enforceable.²⁸ In this regard, Section 2 of the FAA provides, in pertinent part, as follows:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁹

Because "unconscionability" is grounds for revoking a contract, Jackson argues the FAA requires the court to determine whether the agreement to submit questions of arbitrability to the arbitrator is itself "valid" and "enforceable" when one party asserts the defense of unconscionability, before the arbitrator can decide whether or not the dispute is arbitrable.³⁰ Jackson contends that unconscionability precludes the "making" of a contract to arbitrate and thus falls outside the *AT&T/First Options* holdings.³¹

Jackson also argues that, as a matter of policy, the Court should refuse to permit arbitrators to decide defenses to the delegation clause. According to Jackson's brief to the Supreme Court, arbitrators have a self-interest in keeping the arbitration going, because of the potential for fees.³² Jackson further argues that

the party asserting unconscionability will be required to expend attorney's fees and pay a portion of the arbitration fees and costs before having his claim of unconscionability decided.³³

Oral Argument Preview

A key feature of oral argument will be the interplay between Chief Justice Roberts, who argued the *First Options* case while in private practice, and Justice Breyer, who wrote the opinion for a unanimous Court. As noted above, one of the issues in *First Options* was, who had the power to determine arbitrability: the court or the arbitrators? Unlike in the present case, this issue in *First Options* did not arise in the context of a motion to compel arbitration. Rather, the issue arose in a challenge to the enforcement of an arbitration award, after the parties had argued the question of arbitrability before the arbitrators. As counsel for the party challenging the arbitration award in *First Options*, the future Chief Justice convinced the Court there was no clear and unmistakable agreement to submit the question of arbitrability to the arbitrators and, thus, their award should be vacated because the arbitrators lacked the jurisdiction to determine that the dispute was arbitrable. The Court's opinion in *First Options* reiterated the general rule, as announced in *AT&T*, that gateway issues such as arbitrability are presumptively for the courts to decide unless the parties "clearly and unmistakably" agree to submit the issue to the arbitrator. Labeling as "rather arcane" the question of "who (primarily) should decide arbitrability" Justice Breyer (who drafted the opinion in *First Options*) observed it was not one on which the parties tended to focus when they agreed to arbitrate.³⁴ But he emphasized the Court's long-standing statement of principle that the courts should enforce agreements according to their terms and the intentions of the parties.³⁵

Justice Breyer also authored the opinion in *Howsam v. Dean Witter Reynolds, Inc.*,³⁶ which did not itself construe a delegation clause but distinguished "gateway issues" (presumptively for the court, absent contrary agreement) from what the Court called "procedural issues" (presumptively for the arbitrators), such as claims of waiver, delay and the like.³⁷ The *Howsam* opinion is likely to come up in Rent-A-Center's argument as further support for the proposition that the Court has always construed the FAA to permit the parties to overcome the presumption of judicial reso-

lution of gateway issues if the parties agree to assign them to the arbitrator.

An early question the Justices likely will raise at oral argument is why the Court's decisions in *AT&T* and *First Options* did not already dispose of Jackson's argument that the FAA requires the courts to decide the validity of an agreement to submit gateway issues to the arbitrators. If Jackson's argument is correct, Section 2 of the FAA would require a court to decide not only questions as to the validity of the delegation clause, but all gateway issues. *AT&T* and *First Options* both acknowledge that the parties may "clearly and unmistakably" agree to submit the question of arbitrability to the arbitrators. Rent-A-Center, no doubt, will agree that the question already has been decided. Jackson, in turn, will restate the position in his brief that neither *AT&T* nor *First Options* actually ruled with regard to who decides whether such a clause was validly entered into in the first place.

The answer to that question may lead to a further question as to whether or not the Court's acceptance of Jackson's argument will eviscerate agreements to arbitrate that incorporate institutional arbitration rules which already provide for arbitrator decisions regarding their own jurisdiction. Rent-A-Center will likely argue that policies in favor of respecting party autonomy and protecting their shared expectations is exactly why the Court should reverse the Ninth Circuit's decision. Jackson's counsel likely will respond that such a decision would have only a limited impact on these rules and would not affect cases where a party does not challenge the agreement's validity, cases where the parties go directly into arbitration without court intervention, or arbitration disputes that do not fall within the FAA, such as disputes that do not implicate interstate commerce (a very narrow group of disputes). Jackson's counsel also may argue that the Court has never really held that the incorporation of institutional arbitration rules is the type of explicit agreement required to delegate gateway issues to an arbitrator and that, accordingly, such implicit incorporation does not actually meet the *AT&T/First Options* "clear and unmistakable" test.

The Justices may ask Rent-A-Center's counsel whether, if they accept Jackson's FAA argument, unconscionability goes to the making of a contract or is simply

a common defense to a contract. Rent-A-Center will likely argue, as in its briefs, that unconscionability is a defense, like laches or waiver, and does not go to the making of the contract. Rent-A-Center will likely also argue that: the FAA permits the parties to delegate that determination to the arbitrator and nothing in Section 2 prohibits it; that the FAA's primary purpose is to eliminate the anti-arbitration bias of the courts and to provide the parties with an efficient and prompt resolution of their dispute on such issues as the parties have agreed to submit to arbitration; that if the parties agree to delegate the issue of arbitrability to the arbitrator, it does not matter whether or not the defense goes to the making of the contract; that the court's only role under Section 2 is to determine objectively whether or not there is a document signed by the parties which "clearly and unmistakably" assigns the gateway issues to the arbitrator; and that once that question is answered, the court may not get into "subjective" questions as to whether or not the agreement to arbitrate the issue was unconscionable.

The Justices also may ask Rent-A-Center's counsel whether there are some circumstances in which the court, and not the arbitrator, must determine whether the parties validly entered in an agreement delegating the gateway issues to the arbitrator. For example, what if the party opposing arbitration claims that the signature on the arbitration agreement is a forgery? What if he claims that he signed the agreement under duress, with a gun pointed at his head or other threat of physical violence or threat of termination from employment? Or, what if he spoke only Spanish, and the agreement was written in English? Or, he was illiterate and was told he was signing some other type of agreement?

There may be two ways to distinguish these hypothetical situations from the present case. Rent-A-Center will likely argue that forgery, illiteracy or language issues go to whether or not the parties objectively entered into a clear and unmistakable agreement to arbitrate the gateway issues. In such instances, a court need not get into subjective intent, as the Ninth Circuit did, in order to keep for itself the issue of arbitrability. Additionally, and especially with respect to a claim of duress, Rent-A-Center's counsel likely will cite to *AT&T* and the dissent below for the proposition that in cases where a party comes forward

with "forceful evidence"³⁸ that the party did not freely agree to delegate the issue to the arbitrator, the courts have always been free to determine the issue; however, a mere allegation of unconscionability, without more, should not be sufficient to deprive the other party of the benefit of the bargain.

These distinctions may lead some Justices to question whether there can be any principled distinction among types of defenses to delegation clauses, or whether the exceptions will swallow up the rule. Might not a bright-line rule be better? Does not creating exceptions to the parties' express agreement to delegate the question of arbitrability to the arbitrators create an incentive for the party opposing arbitration to throw up as many challenges to the validity of the agreement as possible? Would that not defeat the purpose of the FAA?

Similarly, the Justices may ask Rent-A-Center's counsel whether the First Circuit was incorrect in *Awuah* when it refused to enforce the delegation of the gateway issues to the arbitrator because the costs and burdens of arbitrating the issue rendered the arbitration remedy "illusory." "What if the arbitration agreement required Jackson to arbitrate the question 1,000 miles away from home?," the Justices might ask. Rent-A-Center's brief suggests that the correctness of *Awuah* is likely to be conceded at oral argument.

Jackson's counsel may be asked why he believes that subsequent judicial review is an unacceptable remedy. *First Options* established that if the arbitrators get it wrong, and the parties did not clearly and unmistakably agree to submit the gateway issues to them, a court may vacate the eventual arbitration award or refuse to confirm it. Jackson's counsel likely will answer that many litigants do not have the financial resources to participate long enough to challenge the ultimate award judicially, so consigning them to arbitration at the outset effectively forces them to abandon their claims or defenses.

The ideological division within the Court regarding the arbitrability of employment disputes in general and statutory antidiscrimination claims in particular may pit Justices Roberts, Thomas, Scalia, Kennedy and Alito against Justices Stevens, Ginsburg and Breyer, who dissented from the Court's recent holding

in *14 Penn Plaza LLC v. Pyett* that a collective bargaining agreement could subject individual statutory antidiscrimination claims to arbitration.³⁹ Justice Stevens opined in his dissent in *Pyett* and in prior cases that statutory remedies are not arbitrable unless Congress has expressly so provided in law.⁴⁰ Justices Stevens, Breyer and Ginsburg also cited the disparity in bargaining power between employers and employees in their dissent from the decision in *Circuit City Stores, Inc. v. Adams*, which reversed a Ninth Circuit decision holding that Section 1 of the FAA excluded all employment contracts from arbitration.⁴¹ At oral argument, these Justices likely will focus again on this perceived disparity, as well as on whether it is unconscionable to force employees to arbitrate statutory discrimination claims. Recalling again that Justice Breyer authored the *First Options* and *Howsam* opinions, it will be interesting to see which side of him dominates oral argument and how he may attempt to reconcile his avowed respect for party autonomy with the dissents he joined in *Pyett* and *Adams*.

In the next issue, we will review what actually happened at oral argument and attempt to determine whether the Justices' questions provide clues to how the Court ultimately will rule. We also will examine whether Justice Sotomayor's pre-Supreme Court track record interpreting the FAA provides a reliable guide to which way she will vote.

Endnotes

1. 9 USC §§ 1 et seq.
2. Case No. 09-497, United States Supreme Court.
3. See American Arbitration Association, Rules of Commercial Arbitration, R-7; American Arbitration Association, International Centre for Dispute Resolution, Art. 15; UNCITRAL Model Rule (Amended 2006), Art. 16(1); International Chamber of Commerce Dispute Resolution Rules, Rule 4.
4. Brief of Petitioner, at 5 (hereinafter, Pet. Br., at ___).
5. *Id.* at 2.
6. *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 919 (9th Cir. 2009).
7. 546 U.S. 440, 446 (2006).
8. 388 U.S. 395 (1967).
9. 581 F.3d at 915.
10. *Id.* at 915-916.
11. *Id.* at 917.
12. *Id.* at 916 (citing *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007)).
13. *Id.* at 918 (citing *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009)).
14. 514 U.S. 938, 944 (1995) (quoting *AT&T Techs. Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)).
15. 581 F.3d at 917.
16. *Id.* at 916.
17. *Id.* at 917.
18. *Id.* at 919-20.
19. *Id.* at 920 (Hall, J., dissenting).
20. *Id.* at 921 (quoting *AT&T*, 475 U.S. at 649).
21. *Id.* at 922 (emphasis in original) (citations omitted).
22. Petition for Certiorari, at 9, 15 (hereinafter, Pet. Cert., at ___).
23. Pet. Cert., at (i).
24. Pet. Br., at 16.
25. *Id.* at 17.
26. *Id.* at 22.
27. *Id.* at 31.

28. Brief for Respondent, at 10 (hereinafter, "Res. Br. at ____).
29. 9 U.S.C. § 2.
30. Res. Br., at 11.
31. *Id.*, at 18-29.
32. *Id.*, at 20.
33. *Id.*, at 49-53.
34. *First Options*, 514 U.S. at 945.
35. *Id.* at 947.
36. 537 U.S. 77 (2002).
37. *Id.* at 84-85.
38. *AT&T*, 475 U.S. at 1421.
39. 129 S. Ct. 1456 (2009).
40. *Id.* at 1475-76 (Stevens, J., dissenting).
41. 532 U.S. 105, 124 (2001) (Stevens, J., dissenting). ■